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NTSB Order No. EA-3584

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 26th day of May, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-10447

v.

FRANKLIN P. TOUPS,

Respondent.

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins issued on January 3, 1990, following an evidentiary hearing.¹ We grant the appeal.

The Administrator's order of suspension (complaint) charged respondent with violations of § § 135.213(a), 213(b), and 215(a), and § 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Parts 135 and 91).² The complaint arose in connection with

¹The initial decision, an excerpt from the hearing transcript, is attached.

²These, as well as other relevant provisions, are reproduced in the appendix.

respondent's actions as pilot-in-command of a January 27, 1989 flight between Animas Airpark, Durango, CO, and Grand Junction, CO. The complaint charged respondent with violating subsection 213(a) in failing to use a prescribed weather source in a Part 135 cargo-carrying operation, when such an operation required the use of a weather report or forecast. The subsection 213(b) violation was based on his conducting an instrument flight rules ("IFR") operation, but failing to use weather observations taken at the relevant airport. The subsection 215(a) charge arose as a result of respondent's alleged IFR operation either outside of controlled airspace or at an airport that did not have an approved standard instrument procedure. The section 91.9 violation was premised on the above actions, which allegedly were careless.³

At the hearing, the parties agreed that it was snowing that day. Respondent claimed, however, that visibility down the valley was "at least three miles, probably up to five miles." Tr. at p. 100.⁴ In contrast, two witnesses testifying for the

³Thus, the § 91.9 claim is residual. Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there (a violation of an operational FAR regulation is sufficient to support a finding of a "residual" or "derivative" § 91.9 violation) .

⁴Respondent testified that there is a ridge with an average elevation of 8000 feet that runs north-south just to the west of the airport, and a river valley to the east of the airport also running north-south. The height of the ridge to the west above the runway is approximately 1400 feet. Respondent stated that he could see it prior to takeoff, and that, even though takeoff, at approximately 5:45 P.M., was after official sundown and it was
(continued. ...)

Administrator claimed that a blizzard was in progress, both near the airport and in a wider area, and that visibility was very low.⁵

To prove other aspects of the complaint, the Administrator introduced testimony that: 1) respondent's aircraft contained 85 pounds of cargo; 2) there was no National Weather Service reporting station or FAA-approved weather source at Animas; 3) Animas Airpark was not in controlled airspace; and 4) Animas had no standard instrument approach.⁶ Respondent, in turn, argued that the IFR clearance given him did not technically apply to his flight and, therefore, the flight was visual flight rules ("VFR"), not IFR.⁷ (If it were VFR, it is clear that the

⁴ (..continued)
"pretty dark, " the lights of Durango "light up the area very nicely." Id. and pps. 105-106.

⁵One of the witnesses was the FAA employee with whom respondent had communicated in obtaining his clearance and who was responsible for disseminating weather information in the area. He testified that, at the time, there was a widespread snow system affecting the entire Four Corners area. Tr. at p. 41. See also Tr. at pps. 51-53, 55.

Another witness for the Administrator, the aviation safety inspector assigned to respondent's employer, Kangaroo Transportation, Inc., also testified to the bad weather. He was near the Animas Airport at the time, and estimated visibility at 1/8 of a mile. Tr. at p. 25. He noted that respondent took off approximately 30 minutes before an accident occurred at the airport. Id. at p. 13.

⁶Tr. at pps. 14, 17, 22, 27-28, 40, and Exh. 5.

⁷We agree with the law judge's rejection of respondent's semantic argument (see Tr. at pps. 59-68) that the clearance applied not to this flight but to a flight from distant Las Animas County Airport and, therefore, respondent could not have been operating IFR. Despite the controller's incorrect
(continued. ...)

section 213 and 215 allegations would not lie.)⁸

The law judge found that, at takeoff, conditions were VFR. Therefore, he concluded, there was no § 91.9 violation. He stated that Part 135 subsections 213(a) and (b) were redundant, and found only a subsection (b) violation for taking off with an IFR clearance where there was no authorized weather observer. Finally, the law judge dismissed the subsection 135.215(a) charge for insufficient evidence, and then reduced the sanction to a 15-day suspension.

The Administrator's appeal challenges only the law judge's failure to find violations of sections 213(a) and 215(a).⁹ For the reasons that follow, we agree that the law judge's analysis was in error.

1. Section 135.213(a). As noted above, the law judge dismissed this claim as redundant. Although the Administrator offers no real analysis of this conclusion, we disagree with it. Subsection (b) requires (with exceptions) that weather

⁷ (. . continued)
terminology, all parties understood that the clearance was for respondent's flight from Animas Airpark.

⁸It is also clear that, had respondent: 1) taken off VFR, and obtained his IFR clearance in flight rather than before takeoff as he did; or 2) been operating under part 91, as opposed to Part 135, he would not have violated the cited regulations. As to 2), and although not directly raised by the appeal, we note that there was no rebuttal to the Administrator's Exhibit 5, showing aircraft cargo, and respondent testified that the "freight" was bank checks. Tr. at p. 103.

⁹He does not appeal the dismissal of the section 91.9 claim. Accordingly, we have not reviewed the law judge's underlying finding of fact that conditions were VFR at takeoff.

observations be taken at the airport where the operations are conducted. Subsection (a) specifies the authorized sources of a weather report, if one is required. There is nothing redundant in these sections.

Respondent argues (Reply at 2-3) that the two sections are solely definitional, and do not prohibit any conduct because they do not contain words such as "no person may." Regulations need not, however, be phrased in the negative. These rules are framed in the affirmative, requiring that a person "shall" use particular weather sources (subsection (a)) and that weather observations "must" be taken at a particular airport (Subsection (b)).¹⁰ Acting contrary to these requirements is obviously prohibited.

Not only are the two subsections not redundant, the record establishes a violation of subsection (a) as well. The unrebutted testimony shows that Animas Airpark has no National Weather Service reporting station, nor any FAA-approved weather source. Tr. at pps. 22 and 40. Accordingly, the Administrator's complaint in this regard is reinstated.

2. Subsection 215(a). The law judge found that respondent took off with an IFR clearance. Tr. at p. 124. The record contains unrebutted evidence that respondent operated the aircraft both in uncontrolled airspace and at an airport without

¹⁰Respondent's additional claim that the division of subsections (a) and (b) is without rational basis is belied by a careful reading of them. In any case, whether the division is irrational or arbitrary is not an issue considered by this Board. Rochna v. NTSB, 929 F.2d 13 (1st Cir. 1991).

an approved standard instrument approach procedure. Tr. at pps. 22, 27-28.¹¹ Although subsection (a) requires only proof of one or the other, the law judge found insufficient evidence to prove this violation. His discussion indicates his belief that respondent had some sort of "variance" (see Tr. at p. 125), and this variance was equivalent to the stated exceptions to the rule, at § § 215(b), (c), and (d). In reaching this conclusion, the law judge noted respondent's argument that the clearance was pre-filed and that air traffic control knew this was a Part 135 flight. Therefore, the argument goes, IFR operations in uncontrolled airspace were condoned. Reply at p. 4.

There are a number of flaws in this analysis. First, none of the exceptions in § 215(b), (c), or (d) covers the instant situation.¹² Instead, the law judge's approach requires a conclusion that an exception was created here due to the FAA's action (or inaction). That is, the FAA knew, from the set and recurring flight plan (among other things] that this was a part 135 operation. Therefore, a variance under section 215 should be implied because otherwise the FAA granted a clearance that would lead to unlawful operations.

We decline to impose on the FAA the burden this theory would require. Even were it true that the air traffic controller who

¹¹Later testimony clarified that controlled airspace began 1200 feet from the ground. Tr. at p. 74.

¹²Subsections (b) and (d) require that the Administrator issue specialized operations specifications -- not in evidence here. Subsection (c) requires approval of the certificate holder for the operations -- also not in evidence.

gave the clearance or the employee who transmitted it to respondent knew this to be a Part 135 operation, neither individual should be obliged to be aware of all conditions at all airports in his jurisdiction¹³ and act to prevent pilots from FAR violations. Accord Administrator v. LaCava, NTSB Order EA-3243 (1991), slip op. at p. 5 (TCA violation not excused or mitigated because air traffic control failed to warn); Administrator v. Saluzzi, 2 NTSB 1733, 1735 (1975) (flight service station information that a previous flight was completed via VFR does not mitigate respondent's operation in less than VFR conditions).¹⁴ Instead, it continues to be respondent's obligation, as pilot-in-command, to ensure compliance with all pertinent regulations.

Second, even if respondent's theory were acceptable as a matter of law, it proceeds from an unproven premise: that "the Administrator condoned and permitted Respondent and other pilots flying for Respondent's employer to routinely operate aircraft under IFR from the Animas Air Park." Reply at p. 4. The record, instead, supports the opposite proposition -- that respondent's obtaining the clearance on the ground prior to takeoff was unusual; it was normally obtained after takeoff. Tr. at p. 101. Having rejected the law judge's analysis, and the Administrator

¹³E.g., whether an airport has an approved weather source and standard instrument approach; whether it is in controlled airspace.

¹⁴This case has nothing in common with Administrator v. Crawford, 5 NTSB 1000 (1986), for example, where particular ATC action was found to have contributed directly to the incident.

having proven both the alternative facts necessary to find a violation of § 135.215(a) , we reinstate that charge.

Finally, because we have reversed the law judge's dismissal of two of the four charges, we must review the matter of sanction. The Administrator originally sought a 45-day suspension, which the law judge, finding a violation of only one provision, reduced to 15 days. In his appeal, the Administrator does not seek reinstatement of 45 days. Rather, he seeks an "appropriate" sanction. In light of our finding that the Administrator met his burden of proving violations of § § 135.213(a) and (b), and 215(a), an appropriate sanction would be 30 days.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is modified as discussed in this decision; and
3. The 30-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.¹⁵

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁵For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

APPENDIX

§ 91.9 (now 91.13) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ § 135.213(a) and (b) provided:

§ 135.213 Weather reports and forecasts.

(a) Whenever a person operating an aircraft under this part is required to use a weather report or forecast, that person shall use that of the U.S. National Weather Service, a source approved by the U.S. National weather Service, or a source approved by the Administrator. However, for operations under VFR, the pilot in command may, if such a report is not available, use weather information based on that pilot's own observations or on those of other persons competent to supply appropriate observations.

(b) For the purposes of paragraph (a) of this section, weather observations made and furnished to pilots to conduct IFR operations at an airport must be taken at the airport where those IFR operations are conducted, unless the Administrator issues operations specifications allowing the use of weather observations taken at a location not at the airport where the IFR operations are conducted. The Administrator issues such operations specifications when, after investigation by the U.S. National Weather Service and the FAA Flight Standards District Office charged with the overall inspection of the certificate holder, it is found that the standards of safety for that operation would allow the deviation from this paragraph for a particular operation for which an ATCO operating certificate has been issued.

§ 135.215 provided:

§ 135.215 IFR: Operating limitations.

(a) Except as provided in paragraphs (b), (c) and (d) of this section, no person may operate an aircraft under IFR outside of controlled airspace or at any airport that does not have an approved standard instrument approach procedure.

(b) The Administrator may issue operations specifications to the certificate holder to allow it to operate under IFR over routes outside controlled airspace if -

(1) The certificate holder shows the Administrator that the flight crew is able to navigate, without visual reference to the ground, over an intended track without deviating more than 5 degrees or 5 miles, whichever is less, from that track: and

(2) The Administrator determines that the proposed operations can be conducted safely.

(c) A person may operate an aircraft under IFR outside of controlled airspace if the certificate holder has been approved for the operations and that operations is necessary to -

(1) Conduct an instrument approach to an airport for which there is in use a current approved standard or special instrument approach procedure; or

(2) Climb into controlled airspace during an approved missed approach procedure; or

(3) Make an IFR departure from an airport having an approved instrument approach procedure.

(d) The Administrator may issue operations specifications to the certificate holder to allow it to depart an airport that does not have an approved standard instrument approach procedure when the Administrator determines that it is necessary to make an IFR departure from that airport and that the proposed operations can be conducted safely. The approval to operate at that airport does not include an approval to make an IFR approach to that airport.